In the

Supreme Court of the United States

October Term, 1963
No. 977

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellant

vs.

JONES MOTOR CO., INC.

PETITION FOR REHEARING OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION UNDER RULE 58

On Appeal from the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 32629.

WILLIAM A. GOICHMAN,
Assistant Counsel,

EDWARD MUNCE,
Assistant Counsel,

JOSEPH C. BRUNO,
Chief Counsel,

For Pennsylvania Public Utility Commission.

127 North Office Building,
Harrisburg, Pennsylvania.

Murrelle Printing Company, Law Printers, 201-203 Lockhart Street, Sayre, Pa.

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To the Honorable the Justices of the Said Court:

The Petition of the Pennsylvania Public Utility Commission for Rehearing under Rule 58 respectfully represents as follows:

(1) On May 18, 1964, at Nos. 900 and 977 October Term, 1963, your Honorable Court, in a Per Curiam memorandum order, granted the Motion To Affirm of the Jones Motor Co., Inc., and affirmed the judgment of the Court below; three Justices of the Court, Mr. Justice Douglas, Mr. Justice Harlan, and Mr. Justice Goldberg, dissented and would have taken jurisdiction.

(2) This decision of the Court presents an apparent conflict with the decision of the Court in *Arrow Carrier*

Corporation v. U. S., 375 U.S. 452, decided January 20, 1964, where the motor carrier was doing the same thing as Jones, but was found guilty of a subterfuge, and this conflict is one of the reasons for this petition.

(3) That the decision of your Honorable Court raises more than a question of fact is pointed up by the history of this case. The Interstate Commerce Commission, which is directly entrusted by Congress with the resolution of factual questions, found and held that Jones Motor Co., Inc. was guilty of a subterfuge. The District Court for the Eastern District of Pennsylvania reversed this finding as a matter of law and your Honorable Court, now, by affirming this decision, is, in effect, holding that carriers such as Jones Motor Co., Inc., are not guilty of subterfuge *as a matter of law*. Certainly, in the minds of a substantial number of lawyers a definite conflict is presented with respect to the meaning of the *Jones* case vis-a-vis the *Arrow-Carrier* case.

(4) That the country as a whole is intimately and vitally affected by your Honorable Court's decision in this *Jones* decision is apparent from the fact that on February 16, 1959, Austin L. Roberts, Jr., and Everette Kreeger, as Attorneys for the National Association of Railroad and Utilities Commissioners, filed with your Honorable Court a Brief as Amicus Curiae in the case of *Service Storage and Transfer Co., Inc. v. Commonwealth of Virginia*, 359 U.S. 171. In that Brief the Resolution of the Association, consisting of all the States in the United States, adopted by the Association on November 20, 1958, is reported. This resolution authorized the Association "to participate in this proceeding on behalf of the Association in support of the jurisdiction of the state regulatory commission over

the transportation involved". In that Brief appears the further pertinent statement on behalf of the Association:

> "If federally certificated carriers can 'tack' together several certificates and by the subterfuge of crossing the state line evade the exercise of police power by an individual state, *then the effectiveness of state regulation is at an end.*"

(5) The aforesaid Association (NARUC) at a meeting held in Portland, Oregon, on August 1 and 2, 1963, by the Executive Committee, adopted a resolution authorizing its Counsel to participate on behalf of the Association in both the *Arrow* and *Jones* cases taking a position in support of the cease and desist orders issued by the I.C.C. This has not come to pass since your Honorable Court has not taken jurisdiction in either case.

(6) There are pending before the I.C.C. and the Federal District Courts other cases involving motor carrier subterfuge, not to mention the thousands of carriers whose daily activities are immediately affected by these decisions as to whether what they are doing is proper or improper.

(7) The Pennsylvania Public Utility Commission as the representative of the Commonwealth of Pennsylvania, one of a number of such states vitally concerned with this problem, is charged with the duty of enforcing the laws of the Commonwealth of Pennsylvania, licensing carriers to perform common carrier service within its borders, and charged with the further duty of protecting such carriers and the general public in this Commonwealth against unauthorized operations by nonlicensed carriers.

(8) The Interstate Commerce Commission upon our complaint held that the Arrow Carrier Corporation and

the Jones Motor Co., Inc., both were engaged in subterfuge operations by engaging in transportation in Pennsylvania from Philadelphia to Allentown through routes and highways in New Jersey.

(9) Recently your Honorable Court upheld the Interstate Commerce Commission in the *Arrow Carrier* case (375 U.S. 452), but has now reversed the Interstate Commerce Commission in this *Jones* case, holding that the I.C.C. erred as a matter of law in finding subterfuge.

(10) Not too long ago Mr. Justice Cardozo with singular adroitness cautioned in *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 510, 55 S. Ct. 462 (1934):

> "The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi jurisdictional findings of an administrative agency. . . We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

(11) Although Mr. Justice Cardozo was speaking of the I.C.C., the same caveat applies here to the problem given Pennsylvania in attempting to do our duty to enforce the law so that the motor carrier guilty of a subterfuge can be prevented from pirating business away from legitimate carriers.

(12) Our state is now without "reasonable certitude" in determining whether a carrier is guilty of a subterfuge under the *Arrow Carrier* case or is blameless under the *Jones* case; certainly, when seven judges of the Superior

Court of Pennsylvania, 188 Pa. Superior Court 261, 149 A. 2d 491; the Interstate Commerce Commission; one circuit judge on the three-judge statutory court in the District Court for the Eastern District of Pennsylvania; and three justices of your Honorable Court—when such judicial officials are of the opinion that Jones is or may be guilty of a subterfuge under the law, how can the Commonwealth of Pennsylvania analyze future cases upon a proper basis? Is there not something more called for in the way of further argument and briefing, together with more precise delineation for administrative and judicial guidance? Must all tribunals inferior to your Honorable Court be left "to argue, to choose," to guess as to whether a particular carrier is guilty of subterfuge under the *Arrow* case, or not guilty under the *Jones* case?

(13) Recently, in *Service Storage & Transfer Co. v. Commonwealth of Virginia*, 359 U.S. 171, 179, your Honorable Court said:

> "Finally, the Commonwealth is not helpless to act. If it believes that petitioner's operation is not bona fide interstate but is merely a subterfuge to escape its jurisdiction, it can avail itself of the remedy Congress has provided in the Act. . ."

(14) This Commonwealth of Pennsylvania, believing Jones Motor Co., Inc., guilty of such a subterfuge, and our judges unanimously having found same in 188 Pa. Superior Court, 261, 149 A. 2d 491, this Commonwealth filed a complaint with the Interstate Commerce Commission on November 20, 1959, almost five years ago, and that Commission, after extensive testimony and briefing, found Jones Motor Co., Inc. to be guilty of a subterfuge. And now your Honorable Court by affirming the decision of

the District Court without argument, sets aside the decision of the Interstate Commerce Commission as error, and the remedy which your Honorable Court said Congress provided for this Commonwealth is snatched away from us, or rendered as illusory as a Barmecide feast.

(15) Not only is the remedy which Congress has provided for us taken away, but there are no guidelines or principles which we can use to determine how and when we can ever avail ourselves of the "remedy" Congress has provided in the Act.

(16) This question, because of its tremendous importance to the several states and because of the aura of doubt that surrounds this whole field and because of the right of a state to know when and how to proceed and what its rights are, demands further consideration by the Court. It is respectfully submitted that the decision of your Honorable Court should be reconsidered and vacated, and that an order should be entered by your Honorable Court taking jurisdiction of this case so that the parties can adequately and fully brief your Honorable Court on the multiple problems in the field; so that the National Association of Railroad and Utilities Commissioners can offer its assistance to the Court; and so that other parties or states may offer their guidance, to the end that the decision of your Honorable Court will serve as a beacon light guiding the several states in their endeavor to know when and under what circumstances an I.C.C. carrier is committing a subterfuge.

(17) The decision of your Honorable Court in the *Jones* case leaves the states back where they were before the Federal Motor Carrier Act of 1935 was passed. At that, time one of the avowed purposes of the Act was put

on record by the Chairman of the House Subcommittee considering the Bill—Congressman Meritt (79 Cong. Rec. 12207):

> "But the demands of the state regulatory bodies for Federal control of interstate business by busses and trucks is unanimous. It has been found in some cases that bus lines and other forms of transportation will nominally start just over the line of one state, but do the major part of their business in adjoining states *simply for the purpose of using its interstate character to escape the control and the regulation of the state in which the major part of its business is done.* From this point of view alone, a Federal law is not only justified but demanded."

(18) Your Honorable Court has in the past taken cases for plenary argument when such cases are "test" cases or are typical of a great number of pending or existing cases with the view of sufficiently canvassing the legal principles to afford guidance and instruction for the multitude of cases awaiting disposition.

(19) For these reasons your Honorable Court is respectfully urged to take jurisdiction of the *Jones* case and set the matter down for argument.

Wherefore, the Pennsylvania Public Utility Commission respectfully petitions your Honorable Court to reconsider its decision, vacate the per curiam order, and place this case on the list for argument.

And it will ever pray, etc.

Respectfully submitted,
WILLIAM A. GOICHMAN,
Assistant Counsel,
EDWARD MUNCE,
Assistant Counsel,
JOSEPH C. BRUNO,
Chief Counsel,
For Pennsylvania Public Utility Commission.

CERTIFICATE

The undersigned, a member of the Bar of the Court, certifies that this Petition for Rehearing of the Pennsylvania Public Utility Commission under Rule 58 is presented in good faith and not for the purpose of delay.

WILLIAM A. GOICHMAN

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